Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	)	CC Docket No. 01-337
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20; 98-10
	)	
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. Section 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises	)	WC Docket No. 04-242
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

ARIZONA CORPORATION COMMISSION RESPONSE TO OPPOSITIONS/COMMENTS OF VERIZON, AT&T BELLSOUTH AND QWEST

I. Introduction

On September 23, 2005, the Federal Communications Commission ("FCC") issued a Report and Order and Notice of Proposed Rulemaking[1] applying the recent Supreme Court

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al*, 70 FR 60222, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (rel. Sept. 23, 2005)("*Wireline Internet Access Order*").

Decision in *Brand X*[2] to the DSL offerings of telecommunications carriers. On November 16, 2005, the Arizona Corporation Commission ("Arizona" or "Arizona Commission") filed a Petition for Reconsideration and/or Clarification on two narrow issues raised by the Order: (1) the classification of DSL when offered and combined with VoIP; and (2) the classification of DSL transmission when offered independent of Internet Access. Comments and/or Oppositions to the Arizona Commission's Petition were filed by the Verizon telephone companies ("Verizon"), AT&T, Inc. ("AT&T"), BellSouth Corporation ("BellSouth"), Qwest Corporation ("Qwest") and the United Power Line Council ("UPLC"). Following is the Arizona Commission's response to the oppositions and comments filed by these parties.

II. Discussion

A. The Use of VoIP Does Affect the Proper Regulatory Classification of DSL Service.

Verizon argues that the use of VoIP should not act to convert the classification of wireline broadband internet access service into a telecommunications service. Verizon at 2. It is not the Arizona Commission's position that wireline broadband access service would be reclassified as a telecommunications service, where it is used as an information service. However, to the extent the underlying DSL or internet access service is used to provide VoIP[3], then under the logic used by the FCC in its decisions leading up to *Brand X* and ultimately the logic underlying the Supreme Court's decision in *Brand X*, the "integrated" service should be classified as a "telecommunications service" not an "information service." This is because from the end user's perspective, the service is a telecommunications service, not an information service.

Contrary to the suggestion of Verizon at p. 3 of its Opposition, Arizona is not trying to undo the Title I relief ordered by the Commission for broadband internet access service. The Arizona Commission is not disputing that under *Brand X* internet access service is an

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[2] *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688 (June 27, 1005)("*Brand X*").

[3] VoIP as used herein is that which makes use of numbering resources from the North American Numbering Plan.

information service. Further, we are not disputing that under the *Brand X* decision and FCC decisions leading up to *Brand X*, and using the "integrated services approach", Internet Access combined with DSL is an "information service". But, using the same logic, VoIP, from the end user's perspective, is a telecommunications service hence under the "integrated services approach", VoIP combined with DSL should be a "telecommunications service."

Nor does Arizona dispute Verizon's (Opposition at 3) contention that it will be difficult to classify services (applications) differently since in some instances, as Verizon notes, the provider may not even know that the end user is using VoIP. *Id.* at 3. While this issue goes well beyond the current proceeding, the Commission could use an allocation procedure as it has done at times in the past.

Finally, as several commenters note, we acknowledge that the FCC has not yet decided the appropriate classification of VoIP service. *See* Verizon Petition at 4; *See also* BellSouth Petition at 8-10. To be clear, the Arizona Commission is not asking the FCC to classify VoIP based upon the record in this proceeding or in response to Arizona's Petition for Reconsideration or Clarification. As the responses to Arizona's Petition for Reconsideration or Clarification indicate, some parties believe that irregardless of how VoIP is classified, this should not affect the classification of the underlying transmission facilities. The Arizona Commission's petition was meant to address this point only, and not to obtain a ruling in this docket on the regulatory classification of VoIP. And, because under the "integrated service approach", DSL services are classified based upon the nature of the service ultimately offered to the end user, we disagree with Verizon and others that the classification of VoIP makes no difference with respect to how the underlying DSL is classified. *See Id.*

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Moreover, we agree with BellSouth that a ruling regarding the regulatory classification of VoIP should be made in the *IP-Enabled Services* proceeding[4]. *See* BellSouth Comments at 10.[5] Arizona's petition was phrased in the alternative on this issue. It sought clarification, to the extent as suggested by BellSouth, the Commission intends to address the combined VoIP/DSL offering in the IP-Enabled Services Proceeding.[6] However, to the extent it intended to address the issue of the classification of DSL when combined with VoIP in this proceeding with its rulings, the Arizona Commission sought reconsideration in its petition.

Contrary to the arguments of AT&T, the Arizona Commission does not believe that the result advocated by Arizona is foreclosed by either the FCC's *Wireline Internet Access Order* or the Supreme Court's decision in *Brand X*. *See* AT&T Opposition at 20-21.

AT&T argues that the addition of VoIP would only increase the information processing capabilities of the service. *See* AT&T Opposition at 20; See also Qwest Comments. But, that ignores the underlying logic of *Brand X* and the Commission's decisions leading up to *Brand X*. As the Supreme Court noted in *Brand X*, the FCC concluded, that cable modem service was not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information–processing capabilities provided by Internet access. In particular, the wire is used to access the World Wide Web, newsgroups, and so forth, where there is computer processing, manipulation of the information, and storage of the messages or data. However, when VoIP is accessed by the end user, it is not used in connection with the information processing capabilities of internet access. The end user is able to "transparently

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[4] *In the Matter of IP Enabled Services*, WC Docket No. 04-36, 69 FR 16193, Notice of Proposed Rulemaking (rel. March 10, 2004).

[5] *See contra*, Qwest Comments wherein Qwest asks the Commission to classify VoIP as an information service in its ruling on the Arizona Commission's Petition for Reconsideration. (*Id.* at 3-11). We agree with BellSouth that this would be inappropriate. See BellSouth Comments at p. 9 ("It would not only violate the APA to rule on VoIP classification in this proceeding, but doing so also would prejudge any determination the Commission may reach in the IP-Enabled Services docket").

[6] The Arizona Commission does not agree with BellSouth or Qwest that the Commission has already classified VoIP as an interstate service. In the *Vonage* decision, the Commission acknowledged that the service was jurisdictionally mixed. *See In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) appeals pending sub nom. *Minnesota Public Utilities Commission v. FCC*, No. 05-1069 (8th Cir. Pet. for Rev. filed Jan. 6, 2005).

transmit and receive ordinary language messages "without computer processing or storage of the message.". This meets the definition of "telecommunications" which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. *See* 47 U.S.C. §153(46).

This is also consistent with the *Brand X* decision wherein the Supreme Court noted "[l]ikewise, a telephone company 'offers' consumers a transparent transmission path that conveys an ordinary-language message, not necessarily the data transmission facilities that also 'transmit...information of the user's choosing,' Section 153(43), or other physical elements of the facilities used to provide telephone service, like the trunks and switches, or the copper in the wires." *Id.* at 2706.

Finally, the following passage from the Court's decision is also noteworthy:

> First, in the *Computer II* Order that established the terms 'basic' and 'enhanced' services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order below. *See supra*, at 2696-2697. As we have explained, Internet service is not 'transparent in terms of its interaction with customer-supplied information,' Computer II Order 420, para. 96; the transmission occurs in connection with information processing.

AT&T's argument ignores the integrated nature of the service as seen from the consumer's point of view. *See Brand X* at 2705. The Supreme Court stated:

> What cable companies providing cable modem service and telephone companies providing telephone service 'offer' is Internet service and telephone service respectively—the finished services, though they do so using (or "via") the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct 'offerings.'

Moreover, various forms of protocol conversion have existed in the public switched network as technologies have evolved and have been implemented by carriers, without transforming the classification of the integrated service offered to the end user. For example, on the loop between the end-user and the local switch there have been analog carrier systems, digital

loop carrier, ISDN and wireless loop carrier systems all of which have converted the analog voice signal to a different format with varying forms of signaling being employed. Some of the protocols utilized by these systems have been proprietary and others have been industry standards. Analog, digital and soft switches coexist in the network and transparently deliver voice calls from one caller to another. Similarly the trunk facilities between switches have been some combination of analog, digital or even IP-based as technological change has occurred. As the network has evolved, many different combinations of these technologies and protocol conversions would have been utilized as calls were originated and terminated. Migration to an IP-based network is just one more step in the evolution of the network. Just as the regulatory classification of voice telecommunications did not change with these earlier forms of protocol conversion, use of IP protocol for voice service should not, of itself, necessitate a change in the form of regulation of the service.

Contrary to Qwest's suggestion, just because similar protocol conversions take place with interconnected VoIP, this should not now suddenly transform VoIP into an information service. *See* Qwest Comments at 3-11. The critical question appears to be at what level does the protocol conversion take place. The Act and earlier Commission rulings suggest that the protocol conversion must take place so as to be apparent at the end user level; and would not encompass protocol conversions at the transmission level that have existed in the Public Switched Telephone Network ("PSTN") for years. Qwest appears to be arguing that protocol conversions at the transmission level would transform a service from a 'telecommunications service' into an 'information service'. However, this is not consistent with the current practice with respect to the PSTN.

Moreover, Qwest also appears to suggest that because the internet access service provides enhanced functionalities to end users, this also suddenly transforms VoIP into an information service. Qwest Comments at 8. We don't agree. Moreover, the Supreme Court made clear in *Brand X* that merely because a provider packages voice mail with telephone service, that does not convert the combined service into an information service. "That is because a telephone

company that packages voice mail with telephone service offers a transparent transmission path – telephone service – that transmits information independent of the information–storage capabilities provided by voice mail." *Brand X* at 2709.

And, once again the approach suggested by Qwest, would be a departure from current practice. For instance, with Centrex and many PBX telecommunications service offerings, the transmission path is combined with many enhanced features but still retains its underlying classification as a telecommunications service. The availability of enhanced features has never before transformed the telecommunications service into an information service. Indeed, the Supreme Court also found that the presence of enhanced services offered along with the transmission path would not transform the essential characteristics of the service. *Brand X* at 2709.

Finally, the carriers arguing in opposition to the Arizona Commission's position, appear to be looking at the services from a "layers perspective" rather than from an "integrated services perspective".[7] While, the Commission is considering the "layers approach" in the *IP-Enabled Services* Proceeding, it has not adopted this approach. While the Arizona Commission believes that the layers approach would simplify many of the issues that the FCC now faces, Arizona advocated for a modified layers approach in the *IP-Enabled Services* Proceeding, wherein the applications layer would be classified based upon its functional equivalency to telephone service. However, to the extent it is classified as a telephone service, Arizona advocated a light-handed regulatory approach.

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[7] See Qwest Comments at 4 ("Arizona Ignores That Internet Access Is A Necessary Building Block of True VoIP"); See also Verizon Comments at 2-3 ("The petition admits that the Commission's decision to classify wireline Internet access service as a Title I information service is 'consistent with the Brand X decision," Petition at 3, but argues that such a service should lose its Title I status if a customer uses that service in connection with a particular application – VoIP").

B. All Stand-Alone Broadband Transmission, Including DSL Transmission, Should be Subject to Title II Common Carrier Treatment.

BellSouth, Verizon, AT&T and Qwest all oppose the Arizona Commission's Petition to the extent it seeks reconsideration of the Commission's decision to allow providers to offer stand-alone broadband or DSL transmission on a common carrier or non-common carrier basis.

The Arizona Commission stands by the arguments made in its Petition for Reconsideration on this issue. It does appear to Arizona that with regard to the offerings of many carriers, there is a "holding out" of the service. As Comptel notes in its Opposition to Verizon's Petition for Limited Reconsideration, common carriage involves at its core a holding out to the public, which may under existing case law be a small group of the public. In order to determine whether there is an indiscriminate holding out, one needs to consider factors such as "how many customers it serves, what types of customers it serves, the terms under which the carrier offers service, and whether the carrier independently tailors and negotiates services with each customer, or, in contrast, whether the offerings are more accurately characterized as generic or 'off-the-shelf' services." *Id.* at 9. Since these services have been offered on a common carrier basis in the past, without actually examining a particular carriers' offerings, it would be difficult to suddenly conclude that their offerings are now private carriage. The fact that the service is offered through private contracts is not enough to transform a common carriage offering into private carriage. *See Akron, C.&Y. R.R. v. Interstate Commerce Comm'n*, 611 F.2d 1162, 1167 (6th Cir. 1979) *cert. denied,* 449 U.S. 830 (1980); *see also MCI Telecommunications Corp.v. FCC*, 917 F.2d 30, 38 (D.C.Cir. 1990).

The other part of the *NARUC I* decision which the FCC has considered in the past and is cited by commenters opposing Arizona's Petition relates to whether the public interest requires common carrier operation of the facilities. Several commenters responding to the Arizona petition point out, the focus of the FCC's inquiry in such cases has been on whether the company has sufficient market power to warrant regulatory treatment as a common carrier. *See also In the Matter of AT&T Submarine Systems, Inc.*, FCC 98-263, Memorandum Opinion and Order, 13 FCC Rcd 21,585 (Rel. October 9, 1998). Those commenters note that in the past the FCC has

found that if sufficient alternative facilities exist, including common carrier facilities, then companies would be unable to charge monopoly rents and hence would not have market power. *See also Id.* It is true as Verizon and others point out that as a general matter there are other providers of broadband transmission service. However, the Arizona Commission has not seen any recent studies on what degree alternative providers are available in individual markets and whether those providers have chosen to make their facilities available to others, and on what terms. In some markets there may not be sufficient alternative facilities, and there may not be common carrier facilities unless a CLEC is operating through the use of UNEs.

RESPECTFULLY submitted this 11th day of January, 2006.

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